



Attorney Docket No. 545.41

PATENT

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of AARON LAMSTEIN)	Group Art Unit: 3643
Application No. 10/801,240)	Examiner: Andrea M. Valenti
Filing Date:: 3/15/2004)	APPEAL BRIEF
For: DEEPERSLEEPER)	

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Commissioner for Trademarks
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Alexandria VA 22313-1450

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Box TTAB, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on 4/15/05.
By: Teri Nelmark
Teri Nelmark

Sir:

The following represents applicant's brief on appeal which has now been timely filed. Applicant filed its Notice of Appeal on April 14, 2005 and has included, with this brief filed in triplicate, the necessary fees set forth in 37 CFR 1.17(c).

REAL PARTY IN INTEREST

The real party in interest involved in this application and appeal is Worldwise, Inc., a California corporation, and assignee of the present U.S. Application Serial No. 10/801,240.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to applicant, applicant's legal representative or assignee which would directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.



STATUS OF CLAIMS

The present application was filed with nine claims which remain in the present application, all of which remain subject to the present appeal. A true copy of the claims is appended and is thus made part of the present brief on appeal.

STATUS OF AMENDMENTS

None of the nine claims as originally filed in the present application have been amended.

SUMMARY OF INVENTION

The present invention involves a pet bed and, specifically, a pet bed for use by cats. By the appropriate selection of fabrics, the pet bed can be made to be particularly attractive to cats by positioning a source of catnip strategically below the top surface of the bedding such that the catnip is inaccessible to the cat employing the bed while promoting the scent of catnip to permeate the bed's top surface as the cat employs the bed. See Specification, p. 1, l. 7-11.

Pet bed 10 (Fig. 1) includes outer shell fabric 11 and 12 defining the bed's geometry. The bed 10 is maintained by a resilient compressible film material 16. Top fabric 13 of pet bed 10 is comprised of a plush, high loft fabric which is gas permeable and which is provided with a thickness and texture so as to provide a sleeping surface that a cat would find attractive both from the standpoint of comfort as well as to provide a somewhat roughened surface, conducive to promote anticipated rubbing and rolling actions as the catnip creates its desired effect.

A gas permeable pouch 21 (Fig. 2a) is shown as containing catnip 20 located beneath plush, high loft fabric top surface 13 held in position by compressible interface between resistant, compressible fill material 16 and top plush and gas permeable fabric 13. Ideally, gas permeable pouch 21 is geometrically centered atop resilient, compressible fill material 16 shown in phantom in Fig. 1.

A gas permeable pouch 21 can alternatively be sealed as a one time use, throw away item as the effects of catnip 20 are dissipated or can be refillable. Access to the interior of pet bed 10 is done through a closable opening to enable a user to periodically access gas permeable pouch 21 but is not openable by a cat as gaining access to the gas permeable pouch 21 could prove detrimental to the feline using the present invention. As shown in Fig. 1, conventional access to the interior of pet

bed 10 can be provided by zippered closure 14 configured along seam 15. Alternatively, although not shown, a hook and loop or zippered closure can be provided as well within top fabric 13.

ISSUES

The issues involved in the present appeal are as follows:

1. Was the Examiner correct in rejecting claims 1, 2, 8 and 9 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 6,305,318 to Ford?
2. Was the Examiner correct in rejecting claims 3-7 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,305,318 to Ford?

GROUPING OF CLAIMS

Group I: Claims 1, 4, 8 and 9.

Group II: Claim 2

Group III: Claim 3

Group IV: Claims 5-7

ARGUMENT

Claims 1, 2, 8 and 9 stand rejected under 35 U.S.C. Section 102(b) as being anticipated by U.S. Patent No. 6,305,318 to Ford. It is the position of the Examiner that Ford teaches a pet bed for use by cats comprising a resilient, compressible fill material in an outer shell fabric defining the geometry of the pet bed as having a bottom, sides and top, the latter comprising a plush and gas permeable fabric, closable opening in said outer shell fabric allowing for selective access to the interior of said outer shell fabric, a gas permeable pouch containing catnip located beneath said top fabric such that scent from the catnip is caused to permeate through the gas permeable pouch and gas permeable top fabric.

Regarding claim 2, the Examiner alleges that the reference teaches a gas permeable pouch containing catnip located between the resilient compressible fill material and top fabric relying upon Figure 5 for such disclosure.

Regarding claims 8 and 9, the Examiner has taken the position that Ford inherently teaches that the top fabric is depressed by the weight of a cat using the pet bed noting that scent from the catnip is caused to permeate through the gas permeable pouch and gas permeable top surface when the gas permeable pouch is squeezed, and as a result, scent from the catnip is caused to permeate through the gas permeable pouch and gas permeable gas surface when the animal is present on top of the bed.

Claims 3-7 stand rejected under 35 U.S.C. Section 103(a) again in reliance upon Ford. Specifically, the Examiner notes that Ford is silent on the gas permeable pouch having catnip located beneath the resilient compressible fill material but concludes that it would have been obvious to one of ordinary skill in the art to modify the teachings of Ford at the time of the invention since the modification is merely shifting the location of a known element performing this same intended function and does not represent a patentably distinct limitation.

Regarding claims 5 and 7, the Examiner has "modified" the teachings of the gas permeable pouch noting its selective attachment to the interior surface of the top fabric is taught in Fig. 5.

Regarding claim 6, the Examiner notes that Ford teaches that hook and loop fasteners are known means of securing things in place but is silent on the gas permeable pouch being selectively attachable to the interior surface of the top fabric by such an attachment means. However, the Examiner concludes that it would be obvious to one of ordinary skill in the art to modify the teachings of Ford with known fastening means to prevent the catnip from being undesirably displaced.

Finally, regarding claim 4, although the Examiner acknowledges that Ford is silent on the gas permeable pouch having a closable opening so that catnip can be periodically refilled, it was concluded that it is notoriously well known to provide recyclable pouches as an environmentally sound practice to reduce waste.

Notwithstanding the conclusions reached by the Examiner, there is not a single suggestion in Ford to place a pouch containing catnip beneath a gas permeable fabric or to provide a closable opening in an outer shell fabric allowing for selective access to the interior of the outer shell fabric for placement of a gas permeable pouch containing catnip. There is further not a single suggestion of placing the gas permeable pouch

containing catnip between the resilient compressible fill material of the pet bed and the shell fabric either at the top of the compressible fill material or beneath the compressible fill material as suggested alternatively by claims 2 and 3.

It is quite evident that Ford teaches placing a pouch of scented material, which could be catnip, in a pocket of an outer shell material configured in the shape of a pair of human shorts. As such, the pouch of scented material is placed between two layers of outer shell material and not between outer shell material and the requisite resilient compressible fill material. Although this distinction may seem trivial, it is significant in practicing the claimed invention. Specifically, cats tend to become quite agitated and excited when confronted with a source of catnip. A cat will stop at almost no length to reach the catnip although it is odor emanating from the catnip and not the catnip leaf itself which provides the observed catnip response. By placing the pouch of catnip beneath the outer shell fabric and between the outer shell fabric and the resilient fill material, one is able to generate the desired catnip response by causing catnip odors to pass through the outer shell fabric when the cat has compressed the pet bed by residing upon it with its body weight while ensuring that short of destroying the outer shell fabric, the cat will be unable to reach the catnip under any and all circumstances.

By contrast, Ford teaches placing a pouch of a scented material within a pocket of the outer shell shorts between layers of outer shell material. Not only does this not literally meet the limitations of the claims and thus fails to represent an anticipatory reference under 35 U.S.C. Section 102, but further fails to render the present invention obvious. By placing a scented pouch within the opened pocket of a pair of human shorts, one is not presenting a very substantial obstacle to a cat driven by a catnip response from pawing the interior of the pocket and gaining direct physical access to the catnip pouch which could be quite detrimental to the health of a cat. There is no suggestion in Ford that the pocket be closable or that any attempt be made to restrict access to the pocket by a cat intent upon gaining access to the interior pocket region. This should come as no great surprise for although Ford mentions, in passing, catnip is a possible "scented material" that can be employed, it is not the thrust of Ford to provide a bed generating a catnip response. Instead, it is the intent of Ford to simply provide a pet bed in the shape of a human lap which may contain a scented material of one of many varieties.

It appears that the Examiner has seen fit to simply ignore the limitation found in all of the claims that the gas permeable pouch containing catnip is retained within a closable opening in the outer shell fabric allowing for selective access to the interior of the outer shell fabric. The Examiner has opined that, in referring to Fig. 2, element 9 and col. 2, l. 36-41 of Ford, that the patentee teaches a closable opening. However, there is no teaching in Ford either in the quoted section or otherwise of the reference which teaches that the pocket of Ford intended to receive the patentee's scented material is closable. In fact, just the opposite is implied for a mere side pocket is configured within the Ford article which is devoid of any closure means whatsoever. Clearly, a cat intending to gain access to a gas permeable pouch filled with catnip would easily be able to pull the pouch from the pocket of Ford thus defeating the intent of the present invention.

As to claim 2, there is again nothing in the Ford reference suggesting locating the gas permeable pouch containing catnip between the resilient compressible fill material and top fabric. In opining upon claim 2, the Examiner points to Fig. 5. However, Fig. 5 merely shows the scented pouch placed within the pocket of a configured pair of shorts and not between the outer fabric and the shell material. At final rejection, the Examiner maintains "that the catnip pouch is placed in the pocket it is inherently located between the top layer (i.e. the outer layer of the pocket) and the fill material." The Examiner continues that "applicant has not claimed that the catnip is in direct contact with the fill material [and] [t]he current wording of the claim can lend to the interpretation that there can be many layers between the catnip and the fill material and if there were many layers that catnip would still be "between the top fabric and the fill material." Regardless of how the Examiner wishes to interpret claim 2, the real issue is whether Ford teaches placing the gas permeable pouch containing catnip between the resilient compressible fill material and top fabric. Simply put, Ford does not so teach. Applicant is bewildered as to how claim 2 can be included within and made part of an anticipation rejection under 35 U.S.C. 102(b).

Similarly, as to claim 3, Ford fails to teach locating the gas permeable pouch beneath the resilient compressible fill material. In this instance, the Examiner saw fit to reject claim 3 not as being anticipated by Ford but by being rendered obvious by this

reference. The Examiner, in doing so, has opined that it would be obvious to one of ordinary skill in the art to modify the teachings of the reference "since the modification is merely the shifting location of a known element performing the same intended function and does not present a patentably distinct limitation." At the outset, applicant notes that Ford teaches absolutely no means of changing the location of the catnip pouch as it must be placed within the pocket element of the prior art pet bed. Next, there is no indication why the Examiner considers the modification obvious. The conclusionary statement is made without support. Certainly placing the pouch of catnip below the resilient compressible fill material will enable a user to dictate the proximity of the catnip to the cat employing the bed providing additional flexibility by controlling the intensity of the catnip response. Again, none of this is shown in the reference.

Claims 5, 6 and 7 deal with retaining the gas permeable pouch in a specific location within the pet bed. Claim 5 calls for the pouch being attachable to the interior surface of the top fabric while claim 6 calls for doing so by employing hook-and-loop fasteners and claim 7 does so by providing a pocket sized to receive the subject pouch. There is clearly a benefit in securing the pouch to a specific location to prevent it from inadvertently dislodging and moving to a side location within the pet bed thus reducing its effectiveness. Ford, in simply providing a scented material within a pocket of a pair of shorts fails to disclose any of this. The fact that Ford teaches that hook and loop fasteners are known means of securing things in place is of no avail. The fasteners employed by Ford have nothing to do with the gas permeable pouch disclosed therein.

For the reasons advanced above, it is respectfully asserted that the final rejection of claims 1-9 was rendered in error and that the Board reverse this rejection providing for the allowance of all of the claims of the present application.

Respectfully submitted.

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Dated: April 15, 2005

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CLAIMS

1. A pet bed for use by cats, said pet bed comprising a resilient, compressible fill material, and an outer shell fabric defining the geometry of the pet bed as having a bottom and sides and a top, the later comprising a plush and gas permeable fabric, a closable opening in said outer shell fabric allowing for selective access to the interior of said outer shell fabric, a gas permeable pouch containing catnip located beneath said top fabric such that scent from said catnip is caused to permeate through the said gas permeable pouch and gas permeable top fabric.
2. The pet bed of claim 1 wherein said gas permeable pouch containing catnip is located between said resilient compressible fill material and said top fabric.
3. The pet bed of claim 1 wherein said gas permeable pouch containing catnip is located beneath said resilient compressible fill material.
4. The pet bed of claim 1, wherein said gas permeable pouch is characterized as having a closable opening so that catnip can be periodically refillably introduced to said pouch.
5. The pet bed of claim 1, wherein said gas permeable pouch is selectively attachable to an interior surface of said top fabric.
6. The pet bed of claim 3, wherein said gas permeable pouch is selectively attachable to an interior surface of said top fabric by hook-and-loop fasteners.
7. The pet bed of claim 3, wherein said gas permeable pouch is selectively attachable to an interior surface of said top fabric by providing said interior surface with a fabric pocket sized to receive said pouch.

8. The pet bed of claim 1 wherein as said top fabric is depressed by the weight of the cat using said pet bed, scent from said catnip is caused to permeate through said gas permeable pouch and gas permeable top surface.

9. The pet bed of claim 1 wherein as said gas permeable pouch is squeezed, scent from said catnip is caused to permeate through said gas permeable pouch and gas permeable top surface.

Serial No. 10/801,240 File No. 5119 By MED/MBW
In the Matter of the Application of Aaron Lamstein

Date Mailed 4/15/05

Due Date

The following has been received in the U.S. Patent Office on the date stamped hereon.

- ☐ Oath / Declaration
- ☐ Power of Attorney
- ☐ Check
- ☐ Deposit Account Order Form
- ☐ Drawings _____ sheets
 - ☐ Informal
 - ☐ Formal
- ☐ Assignment
- ☐ Letter (transmittal)
- ☐ Information Disclosure
 - ☐ (Prior Art) Statement
- ☐ Notice of Appeal
- ☐ Extension of Time Request
- ☐ Amendment / Response
- ☐ Affidavit
- ☐ Petition

- ☐ ITU Trademark Application
- ☐ Issue Fee Transmittal Form
- ☐ Trademark Appln. & Specimens
- ☐ Sec. 8 & 15 Affidavits
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- ☐ Utility (regular) Appln.
- ☐ Design Patent Appln.
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